No. 11747.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

L. WALLACE and E. B. LANDRY, a copartnership doing business as FULLERTON MANUFACTURING COMPANY,

Appellants,

vs.

WORLD FIRE & MARINE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation,

Appellee.

BRIEF OF APPELLEE.

W. W. HINDMAN,
E. EUGENE DAVIS,
908 Consolidated Building, Los Angeles 14,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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Appellee's Statement of the Case.

Since this case was tried entirely on written and oral stipulations of fact and written exhibits introduced thereunder, appellee believes that a convenient way of presenting the entire facts to the Court is to set them up exactly as they were stipulated and found by the trial court.

The parties stipulated in writing as follows:

"AGREED STATEMENT OF FACTS. [Tr. 26-27-28.]

"The respective parties, through their attorneys stipulate subject to proper objection as to relevancy and materiality, to the following facts:

1. "That L. Wallace and E. B. Landry are now and were at all times a copartnership doing business under the name of Fullerton Manufacturing Co., with its place of business at 345 East Santa Fe Avenue, Fullerton, California.

2. "That the defendant World Fire and Marine Insurance Company was and now is a corporation organized under and by virtue of the laws of the State of Connecticut and authorized to write fire insurance in the State of California.

3. "That on or about the 31st day of December, 1945, the defendant executed and delivered to plaintiffs its California Standard Form Fire Insurance Policy No. 4801476. The original of said policy is hereto attached, marked 'Exhibit A,' and offered in evidence by plaintiffs."

(This policy was in a provisional amount of $4,400.00 with a limit of liability of $15,000.00, and insured from December 31, 1945, at noon, to December 31, 1946, at noon.)

4. "That on or about the 14th day of February, 1946, a fire occurred at the premises described in said policy as 345 East Santa Fe Street, Fullerton, California.

5. "That the actual cash value of the property described in said policy at said location on said 14th day of February, 1946, was in the sum of $29,625.20, and the actual loss and damage to said property at said location by said fire was in the sum of $27,-253.18.

6. "That the plaintiffs had reported to defendant, in writing, on January 3, 1946, that the actual cash value of the property described at said location on December 31, 1945, was in the sum of $2000.00, whereas, in fact, the said property at said location at said time was of the value of $28,140.72.

7. "That plaintiffs made no further statements or declarations of value to defendant until on or about the 26th day of February, 1946, when plaintiffs

orally reported to defendant that the actual cash value of said property at the time of the fire was $29,625.20, and on the 29th day of March, 1946, in writing, reported the actual cash value of said property to have been, as of January 31, 1946, $29,000.00, and as of February 13, 1946, $29,000.00.

8. "That prior to December 31, 1945, defendant's policy No. 013121 was in full force and effect. Said policy is offered as Defendant's 'Exhibit 1.'"

(This policy insured from December 31, 1944, at noon, to December 31, 1945, at noon, and was identical with Policy No. 4801476, sued on herein, except that the provisional amount was $20,000.00, amended to $15,000.00, and the limit of liability was $30,000.00.)

9. "That commencing on or about the 31st day of January, 1945, plaintiffs reported to defendant, in writing, what purported to be the actual cash value of the property described in said policy as located at 345 East Santa Fe Street, Fullerton, California, as follows:

" 'That plaintiffs, on and as of the 31st day of January, 1945, reported to defendant that the actual cash value at said location to be $5,000.00, when in truth and fact, said actual cash value at said location was in the sum of $19,856.00; that plaintiffs, on and as of the 28th day of February, 1945, reported to defendant that the actual cash value at said location to be $6,000.00 when in truth and fact, said actual cash value at said location was in the sum of $21,535.00; that plaintiffs, on and as of the 31st day of March, 1945, reported to defendant that the actual cash value at said location to be $7,000.00 when in truth and fact, the actual cash value at said location was in the sum of $23,214.00; that plaintiffs, on and

as of the 30th day of April, 1945, reported to defendant that the actual cash value at said location to be $8,000.00 when in truth and fact, the actual cash value at said location was in the sum of $24,820.00; that plaintiffs, on and as of the 31st day of May, 1945, reported to defendant that the actual cash value at said location to be $4,000.00 when in truth and fact, the actual cash value at said location was in the sum of $25,331.00; that plaintiffs, on and as of the 30th day of June, 1945, reported to defendant that the actual cash value at said location to be $4,000.00 when in truth and fact, the actual cash value at said location was in the sum of $25,842.00; that plaintiffs, on and as of the 31st day of July, 1945, reported to defendant that the actual cash value at said location to be $4,000.00 when in truth and fact, the actual cash value at said location was in the sum of $26,353.00; that plaintiffs, on and as of the 31st day of August, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact, the actual cash value at said location was in the sum of $26,864.00; that plaintiffs, on and as of the 30th day of September, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact the actual cash value at said location was in the sum of $27,375.00; that plaintiffs, on and as of the 31st day of October, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact, the actual cash value at said location was in the sum of $27,886.00; that plaintiffs, on and as of the 30th day of November, 1945, reported to defendant that the actual cash value at said location to be $2,000.00 when in truth and fact, the actual cash value at said location was in the sum of $28,338.33; that plaintiffs reported to defendant on the 3d day of January, 1946, that the

actual cash value of such property was, as of December 31, 1945, the sum of $2,000.00, when in truth and in fact, such actual cash value was, as of December 31, 1945, in the sum of $28,140.72.' "

The material portions of the policy sued upon herein are as follows:

The policy insured from the 31st day of December, 1945, at noon to the 31st day of December, 1946, at noon, and contained the following provisions:

"3. 'LIMIT OF LIABILITY.' This policy being for the provisional amount of $4400.00, being 100% of the total contributing insurance, liability of this company is limited to the same percentage of any loss and in no event to exceed the same percentage of each of the following limits, but no insurance attaches under any one or more of the following limits unless a definite amount is specified as a limit and inserted in the blank immediately opposite the location item:

"Item Number	Limit of Liability for all Contributing Insurance	Location Street Number and City
1.	$15,000.	345 E. Santa Fe, Fullerton, California

* * * * * * * *

"8. 'VALUE REPORTING CLAUSE.'

"(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the

last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.

"(B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein."

"9. 'Full Reporting Clause.' Liability under this policy shall not in any case exceed that proportion of any loss hereunder (meaning the loss at the location involved after deducting the liability of specific insurance, if any) which the last value reported to this company prior to the loss, less the amount of reported specific insurance, if any, at the location where the loss occurs, bears to the actual cash value of the property above described, less the amount of specific insurance, if any, actually in force at that location at the time of such report."

* * * * * * * *

"However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss." [Pltf. Ex. 1.]

In addition to the written stipulation, the following oral stipulations were made at the trial, quoting in the exact language of the stipulation:

> "That the defendant received these statements of value referred to and that they believed in them and acted upon them in issuing the second policy, and that they used them in determining the underwriting for the second policy."
>
> "Mr. Davis: Now may I state this, Your Honor. As a matter of common knowledge and practice—and let Mr. Penney listen to me and if he agrees with me I won't have to call this witness—the practice in writing this type of insurance is when the risk is first presented there is a certificate of values and an estimate made and then the policy is issued and monthly reports are made. A month before the last month of the first policy an estimate of the provisional amount necessary to take care of the risk is made, based upon these reports. Those estimates obviously cannot be made as of the last day of the month because they would not have any data to work on, to write a policy on the first of January, we will say; so they take their data up to the first ten months and then upon that data, based upon the reports submitted by the assured to the company, the insurance company decides upon its underwriting. It decides from that the provisional amount that will be necessary, based on the months, and that they collect their deposit premium. Following on from that the assured may report more or less.
>
> "Now in this case, and I think Mr. Penney will agree with me, at the conclusion of this first policy a statement was made to the assured setting up each month's report as the assured reported it. Then an average was made and it was determined from that average in this case that the assured had an

average of $4,000.00 at risk. He had made a deposit premium of some $140.00—I have forgotten the exact amount. The difference between the deposit premium and the minimum premium of $100.00 was returned to him by the agent. It was accepted by him. I think he received it after the loss, but before any reports of different values were made to us. The compilation, based upon these averages, produced a premium of less than $50.00, but because there was a minimum premium provided the assured received back the amount over the minimum that had been made as a deposit premium. Then that data is carried right on into the second policy. Now I can show by Mr. Rankin, who was the underwriter in this case, that this was a renewal policy in the sense the policy was renewed by his office on the data that they already had, and while it was in the form of a new policy it carried into it the information and data used in the old. All of those things I want to show the Court. However, if Mr. Penney agrees they are correct I won't call the witness.

Mr. Penney: I think that is substantially correct, your Honor.

Mr. Davis: Do you stipulate to my statement, the one I made before, Mr. Penney?

Mr. Penney: Yes, I think that is correct. I think the Court will take judicial notice of his experience in matters of this kind.

Mr. Davis: I think it should be a matter of proof, but so long as you stipulate we will rest upon our stipulations." [Tr. 86.]

Appellee's Argument.

This is a suit upon a provisional reporting fire insurance policy. Appellee insured appellants against loss by fire to the property involved herein from the 31st day of December, 1945, at noon, to the 31st day of December, 1946, at noon, in the provisional amount of $440.00, and provided for the monthly reporting by the assured of the actual cash value of all of the property described as insured under the policy, as follows:

> "(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company."

The policy also provided under the provisional amount clause that the insurance provided was provisional, it being the intent to insure the actual cash value of the property subject to the limits of liability and provisions for other insurance provided.

There were several limits of liability provided for in the policy.

Under Paragraph 9 entitled "Full Reporting Clause," which has also been referred to as the "honesty clause," it was provided as follows (eliminating provisions immaterial to this case):

> "Liability under this policy shall not in any case exceed that proportion of any loss hereunder * * *

which the last value reported to this company prior to the loss, * * * bears to the actual cash value of the property above described, * * *"

The policy also contained in Paragraph 9 the further limitation:

"However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss."

The policy also provided in Paragraph 3 of the form the limit of liability for all contributing insurance of $15,000.00, and also contained the standard policy provisions for apportionment of insurance between insurers, which is not material here. [Pltf. Ex. 1.]

The policy was effective as of noon on December 31, 1945, and on January 3, 1946, the appellants reported in writing to appellee that the actual cash value of the property described at said location was, on December 31, 1945, in the sum of $2,000.00, whereas, in truth and in fact, the said property at said location at said time was of the value of $28,140.72. [Tr. 27.]

The appellants made no further statements or declarations of value to appellee until on or about the 26th day of February, 1946, when appellants orally reported to appellee that the actual cash value of said property on February 14, 1946 was in the sum of $29,625.20, and, in writing, on the 29th day of March, 1946, reported to appellee that the actual cash value of said property as of January 31, 1946, was $29,000.00, and was, as of February 13, 1946, $29,000.00. [Tr. 27.]

In the meantime, the property described was, on the 14th day of February, 1946, damaged by fire in the sum of $27,253.18. [Tr. 26-27.]

With the language of the policy clear and unambiguous, as appellants concede (App. Br. pp. 11, 14, 18), and the record and stipulations positive as to the facts, it would seem that no further argument than a statement of these facts need be necessary to demonstrate that the District Court gave judgment to appellants for the maximum amount which appellants under any theory were entitled to. While appellee has not appealed from the judgment disallowing its defense that appellants were entitled to nothing, which defense will hereinafter be discussed, it is obvious that the District Court gave appellants the benefit of the doubt and applied the limitations of the honesty clause rather than the more stringent law called for by appellee's defense of fraudulent misrepresentation and concealment, which would have required a judgment for appellee, and appellants, therefore, have no grounds for complaint or to have the judgment appealed from reversed.

Since it is conceded that the policy is unambiguous, the application of the terms thereof is as simple as common fractions.

The policy specifically provided as a sanction for honesty in making reports that in the event of loss the liability under the policy should not in any case exceed that proportion of any loss which the last value reported to this company *prior to the loss* bears to the actual cash value of the property described.

The last value reported to the company, appellee, *prior to the loss* was the report of January 3, 1946, which was

made in writing by appellants to appellee and in which appellants certified that the actual cash value of the property at the location in question was $2,000.00, whereas, in truth and in fact, the actual cash value at said time and place, to-wit, December 31, 1945, was $28,140.72.

Therefore, applying the unambiguous policy provisions to the deliberately written Stipulation of Facts on this point, it is manifest that appellants are not *in any case* entitled to more than that proportion of the loss of $27,-253.18 as represented by the following formulae:

$$\frac{2000}{28{,}140.72} \times 27{,}253.18 \text{ equals } \$1{,}936.92$$

Appellants' only contention against this obvious and simple result is that the admittedly false report of January 3, 1946, should be considered as applying only to the previous policy expiring December 31, 1945, at noon, renewed by the policy in suit at its expiration. The answer to this false premise is that the facts do not bear it out, and the deliberate written stipulation of the parties is to the contrary. [Tr. 27, par. VI.]

If any other answer is necessary, we believe that it can be no better expressed than as expressed by the trial court in its opinion, as follows:

> "Plaintiffs' report of January 3rd was within the terms of paragraph 8(A), and since they made no other report during January, the conclusion is inescapable that the single report covered both the old and the new policies. They stated that the property was worth Two Thousand Dollars ($2,000.00) on December 31, 1945. If it was worth Two Thousand Dollars ($2,000.00) under the old policy on that day,

it was worth no more under the new one. They cannot blow cold when their figures are to be used to compute premiums, and blow hot when they are to be relied on to compute the company's liability.

"The mere circumstances that the report they made was also within the terms of the old policy, which was a separate and distinct contract, does not alter the fact that it was within the terms of the new policy. To hold otherwise would enable the plaintiffs to profit by their own wrong, and would void the policy as hereinafter discussed."

Moreover, it is clearly demonstrable that if appellants, under the terms and conditions of the policy and the facts stipulated, are not limited to the amount found by the court, they are entitled to recover nothing. Appellee presented a defense going to the entire recovery; that is, a defense of fraud based upon concealment and misrepresentation which should have avoided the policy and defeated appellants' entire cause of action. [Tr. 13-16; f. 13-17.]

While the court denied appellee this defense, it is obvious from the record that although the court found that appellee was not harmed by the concealment and misrepresentations [Tr. 45, f. 37] that the real basis of the court's denial to appellee of this defense was on the grounds that the full reporting, or honesty clause, above discussed superseded the sanctions provided by law for misrepresentation and concealment so far as a misrepresentation or concealment of the actual cash value of the property involved was concerned. This is clear both from the Court's opinion and from the Court's remarks on the motion for new trial. [Tr. 35, f. 28; Tr. 87, f. 12.] At the motion for a new trial, the Court, denying appellants'

motion to introduce further testimony in the form of a statement of values of January 3, 1946, said:

> "I feel if the notice is as you claim, I would have to deny any judgment because I think it admits one of two things. It either admits that they failed to comply with the terms of the policy or your client is guilty of fraud."

Appellee's defense on the question going to the entire cause of action was based upon the following facts:

Prior to the execution and delivery of the policy in suit herein, appellee had executed and delivered another policy effective the 31st day of December, 1944, at noon, to the 31st day of December, 1945, at noon, which was identical in terms, except for the amounts, with the policy in suit, and required the reports of values required in the policy in suit.

Consistently, and throughout the entire term of this policy, although the policy required a report of the actual cash value of the property described in the policy, appellants had made false reports. [Tr. 27, f. 21, to Tr. 29, f. 23; Tr. 43, f. 35 to Tr. 44, f. 36.]

Every month during the term of this policy the appellants, although obligated to report the actual cash value of the property at the time of the report, reported as the true values, values ranging all the way from 1/3 approximately to 1/13 of the actual cash value, and, without going into detail of the many reports, the average of the reports for the period of the policy was $4,000.00 although the true values averaged $25,463.00. [Tr. 27, f. 1 to Tr. 29, f. 23.] Appellee, believing appellants' reports and acting upon them, computed the premium and,

finding from the report that the deposit premium was greater than the premium actually earned according to the reports, returned to appellants the difference. [Tr. 81, f. 5.]

Appellee believed these reports and acted upon them and issued the second policy and used these reports in determining the underwriting for the second policy and in fixing the basis of the deposit premium. [Tr. 78, f. 2 and Tr. 79, f. 4 to Tr. 81, f. 6.]

These representations were false, deliberately made, and with the knowledge of the appellants and are presumed fraudulent. They relate to matters material to the risk. Indeed, it was so stipulated [Tr. 78, f. 2; Tr. 80-81, ff. 4-6], and appellants knew that they were material because it was so provided in the policy. [Appellee's Ex. A, Par. VIII.]

The effect of concealment and false representation upon a contract of insurance has been thoroughly settled both by statutory and common law.

The applicable statutory law of California is found in the Insurance Code in the following sections:

> "330. Neglect to communicate that which a party knows, and ought to communicate, is concealment.
>
> "331. Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.
>
> "332. Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining.

"334. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.

"338. An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind.

"350. A representation may be oral or written.

"351. A representation may be made at the time of, or before, issuance of the policy.

"356. The completion of the contract of insurance is the time to which a representation must be presumed to refer.

"358. A representation is false when the facts fail to correspond with its assertions or stipulations.

"359. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false.

"360. The materiality of a representation is determined by the same rule as the materiality of a concealment.

"361. The provisions of this chapter apply as well to a modification of a contract of insurance as to its original formation."

In *Gates v. General Casualty Co. of America*, 120 F. (2d) 925 (9th Cir.), the Court, speaking of these code provisions, said:

"In so interpreting these code provisions we held them to embody the principle stated by Mr. Justice

Stone in Stipcich v. Metropolitan Life Insurance Co., 277 U. S. 311, 316-318, 48 S. Ct. 512, 513, 72 L. Ed. 895, 'Insurance policies are traditionally contracts *uberrimae fidei* and a failure by the insured to disclose conditions affecting the risk, or which he is aware, makes the contract voidable at the insurer's option. (Cases cited.) * * *.'

"(4) With regard to the court's finding that the concealment was 'fraudulently' made, we regard it as surplusage, for under the California law * * * 'a concealment of fact whether intentional or unintentional, which is material to the risk vitiates the policy. The presence of an intent to deceive is not essential.' Telford v. New York Life Ins. Co., 9 Cal. (2d) 103, 105, 69 P. (2d) 835, 837."

The rules epitomized in the various code sections of the California Insurance Code (Sections 330 to 362, California Insurance Code), are merely restatement of the common law.

"The English rule is that an applicant is bound to disclose a fact material to the risk even though no specific inquiry is made on that subject and the weight of authority in this country favors the English rule. (Bacon on Life and Accident Ins., 4th Ed., Sec. 270, p. 500.) The statutes of this state commit our courts to the rule approved by the weight of authority. * * * Respondent Commission attemps to point out a distinction between a concealment of a material fact and a misrepresentation as to such fact. The legal effect in each instance amounts to the same thing, fraud."

General Acc. Corp. v. Indus. Acc. Com., 196 Cal. 179.

The Court in the above-quoted case then refers to the Code provisions above referred to. (For the Court's convenience, we would point out that the above-cited insurance code provisions were formerly a part of the Civil Code, but were carried bodily into the insurance code without amendments, so that the cases having the Civil Code from Section 2527 on to 2577 are referring to the same code provisions as are above quoted from the Insurance Code.)

It might be noted that the rule originated in marine insurance but has been carried into all forms of insurance, and our Insurance Code applies the rules to all classes of insurance.

As said by *Richards,* one of the most accurate American texts:

> "Long ago, in a leading case, Lord Mansfield with sure prescience, announced the general doctrine for all time to come in these words: 'The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement.' *Carter v. Boehm,* 3 Burr. 1905, 1909.)"

In *Rivaz v. Gerussi Brothers, et al.,* hereinafter cited at more length, the Court quoted from *Phillips on Insurance,* as follows:

> "The true proposition is that stated in *Phillips on Insurance,* s. 531, that "concealment in insurance is where, in reference to a negotiation therefor, one party suppresses, or neglects to communicate to the other, a material fact, which, if communicated, would tend directly to prevent the other from entering into the contract, or to induce him to demand terms more favourable to himself, and which is known or presumed to be known to the party not disclosing it, and is not known, or presumed to be so, to the other.' "

In the case of *Queen Ins. Co. of America v. Cummins,* 267 S. W. 144, the Court said:

> "When a man takes insurance he is asking some one else to take a risk he is unwilling to carry himself, and common honesty requires that he give to the insurer all the information he has regarding the risk. In Southern California Insurance Co. v. Lucas, 15 Ky. Law Rep. 574, it was said:
>
> 'An applicant for fire insurance, whether inquiry was made of him or not, was bound to communicate all facts known to him and by him believed to be material, and his failure to do so must be regarded as a concealment; and it is to be presumed that he knew and believed what men of ordinary intelligence know and believe.' "

As specified by the code and shown throughout all of the cases a concealment or misrepresentation of a material matter voids the policy and entitles the insurer to rescind.

Were the facts concealed and misrepresented material facts? The Insurance Code (Sec. 334) states the rule. It would seem that a quotation of this rule should be sufficient:

> "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries:"

It would seem to go without saying that the actual cash value of the property intended to be insured would be one of the important things the underwriters would wish to know in forming the estimate of the advantages or disadvantages of the proposed contract in determining whether to make further inquiries thereof.

As the Supreme Court said in the case of *The Columbia Insurance Company v. Lawrence,* 10 Peters 507, at page 516, 9 L. Ed. 512 at 516:

> "Whenever the nature of this interest would have, or might have a real influence upon the underwriter, either not to underwrite at all, or not to underwrite except at a higher premium, it must be deemed material to the risk; and if so, the misrepresentation or concealment of it will avoid the policy."

It was stipulated that the defendants received the statements of values and that they believed these statements of values and renewed the second policy.

It would seem that nothing more need be said to show the materiality of the representations. The parties had made these reports material. The plaintiffs knew that they were material. They expressly warranted in their

previous policy the actual cash value—not any amount they chose to report, but the actual cash value. They contracted with the insurance carrier on the basis of making such reports.

The real question is, would the defendant, had it known that in the face of the plaintiff's solemn agreement and warranty to make reports of the actual cash value they had consistently, for almost a year, reported false values, have entered into the contract with them? Would the knowledge that plaintiffs had made false reports consistently throughout the previous year have influenced the defendant in determining whether or not to make further inquiries? I think we can ask ourselves the question. Would we enter into a contract of the highest faith with ones who had so conducted themselves? The knowledge that false reports had been made consistently would certainly have introduced a question of moral hazards and would have had a probable and reasonable influence upon the defendant. The courts recognize the moral hazard as the physical hazard.

Davenport v. Firemen's Ins. Co., 199 N. W. 203;

Patrons Mut. Fire Ins. Co. v. Pagenkoff, 182 N. W. 18;

Westchester Fire Ins. Co. v. Fitzpatrick, 2 F. (2d) 654.

Certainly, had the defendant known the actual cash value of the property, it would, under the terms of the policy, have demanded and received a larger deposit premium. But that is not all. As the Stipulation shows, it is information necessary for it to calculate its re-insurance and probably to determine the amount of net line that it cares to carry.

As said by Judge Cardozo in *Atlantic Fruit Co. v. Hamilton Fire Ins. Co.,* 167 N. E. 184, at page 185:

> "An insurer issuing such a policy has an interest in knowing the value and location of the property at risk to enable it to calculate the premium due from the insured and to some extent for other purposes as, for example, re-insurance."

The question of the amount of value, whether high or low, is obviously always one of the material considerations in determining whether or not to take the risk or in determining the terms upon which the risk can be taken. It is a matter of common knowledge that the premium is much less under the form of policy providing for co-insurance than where the insurance is written without such a limitation. The question is not one of whether the risk was increased by the concealment, but whether or not the insurer was presented a different risk than the true one. A good illustration of this is furnished in an early case where the assured had concealed the imperfect condition of the hull of a boat, and his policy, though against fire only, which was not affected by this condition, was held void.

Lexington Ins. Co. v. Paver, 16 Ohio 324.

It is ridiculous to contend that an insurer would not be influenced in accepting a risk by its knowledge, or lack of knowledge, of the actual cash value of the property.

The only case that we have been able to find which seems to present the exact situation as here, and in which the same contention was made by the plaintiffs, that is, that although they had misrepresented the facts in the

prior policy that these facts should not be related to the new policy, is the case of *Rivaz v. Gerussi Brothers, et al.,* 6 Q. B. D. 222, and is also found in reprint Law Journal 1881, New Series, Vol. 50, Common Law, a case from the Court of Appeals Queen's Bench. There were opinions by all three of the justices participating, but as the opinion of Cotton, L. J., is so concise and covers the ground so thoroughly, we are quoting it in full:

> "I am of the same opinion. It was not disputed—indeed it was found at the trial—that there had been previous policies on goods to be shipped by the defendants, and that before the 1st of October they had declared, on those previous policies, goods to the value of 19,000/ at about 11,000/. The jury by their second findings say that those declarations were made falsely and fraudulently by the defendants, and that the declarations were material to the subscription of the policy, and that the plaintiffs were induced thereby to subscribe the policy. I understand that finding to involve that the underwriters at the time they subscribed the two last policies knew the amount declared on the previous ones; and there is then a further finding that the defendants concealed and abstained from disclosing the amounts which had been at risk on the previous policies. That finding is not disputed. The question is, can the two later policies be upheld under the circumstances? It is said that no concealment would vitiate a policy unless it was a concealment of facts directly concerning the risk. I think that is not the correct rule. It is not the rule which was adopted by the House of Lords

in *Sibbald v. Hill* (1) or in *Ionides v. Pender* (2) when Lord Blackburn disputed the rule laid down by Duer, and agreed with that stated by Parsons. Here it is found that the underwriters were induced to underwrite the policies by the statement of the declarations made under the previous policies, and also that it was a fact material to be known to them what was the amount remaining on the previous policies. In my opinion, the facts concealed here come within the correct rule as to concealment of material facts, and I see no reason to question the findings of the jury, or to say there was nothing upon which the jury could properly find that the underwriters were induced to grant the two later policies upon the faith of the declarations made by the defendants upon the two prior ones. Judgment affirmed."

The law is unquestioned that the appellants, by their consistent, willful, and continuous misrepresentation of the actual cash value of the property have barred themselves from recovery, unless we concede that the honesty clause in this policy supersedes for this purpose the penalties provided by the statute and common law, and that, as the trial court said, appellant's contention regarding the report of January 3, 1946, either admits that appellants failed to comply with the terms of the policy or that they were guilty of fraud, and the trial court either rendered judgment for the appellants for more than they were entitled to or for the maximum they were entitled to, and they cannot complain on this appeal.

Answer to Appellants' Argument.

Appellants group their argument under several subheads. The first is:

The Applicable Rule of Construction.

Little need be said about this subhead, as the rule set forth is well recognized. However, it is equally well recognized that "the rule of construction under discussion does not require the court to give the policy a strained or unnatural construction. The policy, like any other contract, must be interpreted according to the intention of the parties as expressed in the instrument." (*Baine v. Continental Ins. Co.,* 21 Cal. (2d) 1.) Moreover, appellants contend and insist that the policy is not ambiguous, and with this we agree. (App. Br. pp. 11, 14, 18.)

Appellants' next subhead is:

Delinquency in Filing the First Report Does Not Void the Policy.

What has heretofore been said in our brief, we believe, answers every contention under this subhead, with the additional observation that in this statement appellants have set up a straw man to knock down. Appellants, instead of basing their argument upon the decision of the court and its Findings, have attacked certain illustrations made by the Court in its opinion. The Court did not find that delinquency in filing the first report voids the policy. This point was not in issue. The Court found that, as evidenced by the Stipulation of Facts, the appellants did file a report on January 3, 1946, and that the honesty clause was applicable to this report. Had the Court found that delinquency in filing the first report voided the policy, the Court, of course, would have found for the appellee

in total and rendered judgment that appellants take nothing.

The same may be said of appellant's argument under the subhead of:

No Report Was Due on the Policy in Suit Until After the Fire.

This question was not in issue. The appellants did file a report and the authorities cited are not in point. They relate to the computation of time within which an act is to be done, whereas the policy provides that the act is to be done on and as of a certain date, to-wit, the last day of each month of the policy term. Obviously, as the Court points out, December, 1945, was one of the months of the policy term and a report was due as of December 31st of that month, and even with a thirty-day period of grace, would have been delinquent long before February 14, the date of the fire. However, appellants did file a report on January 3, 1946, and consequently were not delinquent, but the decision went not to appellant's acts of omission but was based on their acts of commission.

Appellants' next subhead is:

The Report of January 3, 1946, Was Not a Report Under the Policy in Suit.

What has heretofore been said in our argument applies equally to this. It was a report filed by the appellants after the issuance of this policy. The Stipulation of Facts specifically agreed to this and the evidence so shows. It was the only report filed by appellants subsequent to the issuance of the policy and prior to the fire, and related to the specific property involved herein. We

have heretofore in this brief quoted the trial Court's expression of opinion on this contention, and will rest on that.

The cases cited on page 29 of Appellants' Brief to the effect that a renewal of a fire policy is a new contract adds nothing to the argument. Although it was stipulated [Tr. 81, f. 6] that this was a renewal policy, no contention one way or the other was based upon that fact. The terms and conditions of the policy in suit are the ones that were applied by the trial Court. Acts and conduct of an assured under a previous policy may and will relate to a renewal thereof, or a policy issued in renewal thereof, and a material representation under a prior connected policy is sufficient to void the policy sued on.

Solomon v. Fed. Ins. Co., 176 Cal. 133, 167 Pac. 859;

Eddy v. National Union Ind. Co. (9th Cir.), 78 F. (2d) 545, 80 F. (2d) 284;

Sun Ins. Co. v. Roy, 1 A. L. R. 17, 67 A. L. R. 618.

The Trial Court considered this contention of appellants and gave the proper answer thereto. This report of January 3, 1946, was a report of values, and the honesty clause relates to any report of values which is the last report of values *prior to the loss.* That this report was false is conceded, and appellants' only complaint is that they are penalized because of this false report.

What has heretofore been said, we believe, answers in detail most of appellants'

Specifications of Errors.

Appellants' firset assignment of error goes to Paragraph VII of the Court's Findings of Fact. The answer to this specification is that the Court did not find as stated in the specification, and nothing more can be said. [Tr. 44, f. 37.]

Specifications 2, 3 and 7 go to the questions of law which have already been argued.

Specifications 5 and 6 go to matters not involved in the decision and are answered also by the facts, as shown by the Court's decision, that these Findings and Conclusions were prepared by appellants' counsel, and that appellants neither asked for nor requested Findings on these points.

Specification 4 goes to the Court's denial of motion for a new trial and to open judgment and take additional testimony. Aside from the fact that the matters presented as basis for a new trial were fully considered by the trial Court before decision was rendered, as shown by the Court's opinion [Tr. 35, f. 27], we hardly deem it necessary to call the Court's attention to the well-settled rule that orders denying a new trial are not reviewable on appeal in the absence of a clear abuse of discretion, which has not been shown here.

> *United States v. Bransen,* 142 F. (2d) 232 (9th Cir.).

Or that alleged newly-discovered evidence which would not materially change the result is not ground for a new trial.

> *Id.*

Or that applicant for a new trial is required to rebut the presumption that there has been a lack of diligence.

Id.

Or that the application for a new trial will be denied where it appears that the degree of activity or diligence which led to the discovery of the evidence after the trial would have produced it had it been exercised prior thereto.

Id.

It is respectfully submitted that the District Court committed no error against appellants and that the judgment should be affirmed.

Respectfully submitted,

W. W. HINDMAN,
E. EUGENE DAVIS,
Attorneys for Appellee.